

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED  
MAR 25 1996  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of: )

Interconnection Between Local )  
Exchange Carriers and )  
Commercial Mobile Radio )  
Service Providers )

CC Docket No. 95-185

Equal Access and Interconnection )  
Obligations Pertaining to )  
Commercial Mobile Radio )  
Service Providers )

DOCKET FILE COPY ORIGINAL  
CC Docket No. 94-54

REPLY COMMENTS OF  
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

Mark J. Golden  
Vice President -- Industry Affairs  
Robert R. Cohen  
Personal Communications  
Industry Association  
500 Montgomery Street, Suite 700  
Alexandria, VA 22314-1561  
(703) 739-0300

R. Michael Senkowski  
Jeffrey S. Linder  
Stephen J. Rosen  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 429-7000

March 25, 1996

at 4

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY . . . . .	2
II. COMPENSATION FOR INTERCONNECTED TRAFFIC . . . . .	6
A. COMPENSATION ARRANGEMENTS . . . . .	6
1. THE CURRENT SYSTEM IS NOT WORKING FOR EITHER BROADBAND OR NARROWBAND CMRS PROVIDERS . . . . .	6
2. LEC ARGUMENTS AGAINST BILL AND KEEP FOR BROADBAND CMRS ARE UNPERSUASIVE . . . . .	8
a. BILL AND KEEP FAIRLY COMPENSATES LECS FOR THE USE OF THEIR NETWORKS . . . . .	8
b. BILL AND KEEP IS NOT A FIFTH AMENDMENT TAKING OF LEC PROPERTY . . . . .	10
3. THE RECORD SUPPORTS TERMINATING COMPENSATION FOR NARROWBAND CMRS PROVIDERS . . . . .	14
B. IMPLEMENTATION OF COMPENSATION ARRANGEMENTS .	16
1. JURISDICTIONAL ISSUES . . . . .	16
a. SECTION 332 EMPOWERS THE COMMISSION TO REGULATE LEC-CMRS INTERCONNECTION . . . . .	17
b. THE INSEPARABILITY DOCTRINE FURTHER PERMITS THE FCC TO REGULATE LEC-CMRS INTERCONNECTION . . . . .	22

c.	THE 1996 ACT FURTHER BOLSTERS THE FCC'S AUTHORITY TO REGULATE LEC-CMRS INTERCONNECTION . . . . .	24
III.	CONCLUSION . . . . .	28

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

MAR 25 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of:	)	
	)	
Interconnection Between Local	)	CC Docket No. 95-185
Exchange Carriers and	)	
Commercial Mobile Radio	)	
Service Providers	)	
	)	
Equal Access and Interconnection	)	CC Docket No. 94-54
Obligations Pertaining to	)	
Commercial Mobile Radio	)	
Service Providers	)	

**REPLY COMMENTS OF  
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA"), by its attorneys, respectfully submits its reply comments regarding the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup> The record in this proceeding confirms that: (1) current interconnection agreements unfairly favor LECs over CMRS providers; (2) bill and keep from the tandem switch to the end user will not deprive LECs of fair compensation for the use of their networks by broadband CMRS providers; (3) terminating compensation must be implemented for narrowband CMRS providers; (4) bill and keep is not a Fifth Amendment taking; and (5) the Commission has plenary jurisdiction to implement appropriate terminating compensation arrangements for LEC-CMRS interconnection on a nationwide basis.

---

<sup>1</sup> FCC 95-505 (released Jan. 11, 1996) ("*Notice*").

## **I. INTRODUCTION AND SUMMARY**

In its opening comments, PCIA showed that existing compensation arrangements are inequitable to both broadband and narrowband CMRS providers. Accordingly, PCIA urged the Commission to adopt an interim broadband CMRS plan that consists of zero-cost termination of traffic by both parties from the tandem switch or equivalent to the end user (*i.e.*, each party bears its own transport, switching, and local loop costs), and shared cost of the trunks interconnecting the mobile and LEC switches. For narrowband CMRS, PCIA recommended that the Commission require LECs to pay the entire cost of the trunks connecting the LEC switch to the narrowband switch, and permit narrowband CMRS providers to charge reasonable fees for the use of their networks in terminating calls. As PCIA demonstrated, the Commission has ample authority to implement these measures under Section 332 of the Communications Act and the inseparability doctrine, and that authority is buttressed, not undermined by the Communications Act of 1996.<sup>2</sup>

The opening round comments were sharply divided on the issues of compensation schemes and jurisdiction. Specifically, broadband and narrowband CMRS providers expressed universal dissatisfaction with current compensation arrangements and support for FCC-mandated compensation arrangements. On the

---

<sup>2</sup> PCIA also suggested that LEC-CMRS interconnection agreements be stand-alone contracts filed under Section 211 and that CMRS providers be entitled to compensation from IXCs for originating and terminating long distance traffic. The record amply supports these positions, and PCIA will not address them further on reply.

other hand, LECs generally claimed that the current "market based" compensation scheme is working well, and that bill and keep would unfairly deprive them of revenue because of the current imbalance in calling volume.<sup>3</sup> The LECs further argued that bill and keep is a "taking" without fair compensation. Similarly, while CMRS providers argued that the Commission has the jurisdiction to mandate terminating compensation arrangements for both intra- and interstate calls, LECs asserted that the Commission lacks jurisdiction over intrastate traffic.

These reply comments focus on the major areas of contention. Virtually all CMRS providers, whether broadband or narrowband, explain that they have been unable to negotiate equitable compensation agreements because LECs have all the leverage. FCC action is therefore necessary to counteract market failure. The record further confirms that the compensation schemes proposed by PCIA for broadband and narrowband CMRS are economically rational. PCIA's broadband scheme (zero-cost termination from the tandem switch to the end user and shared cost of interconnection facilities) is efficient because LEC-PCS traffic flows are approaching balance, LEC and CMRS networks are functionally equivalent, it is more expensive to terminate LEC-mobile calls than mobile-LEC calls, and true bill and keep is needed to achieve truly balanced traffic. Compensation for narrowband providers is warranted because they generate substantial revenues for LECs and parity of treatment with broadband is essential to avoid competitive distortions. For both broadband and narrowband CMRS,

---

<sup>3</sup> To PCIA's knowledge, no LEC addressed compensation for narrowband CMRS in its opening comments.

compensation is appropriate because call completion by mobile carriers confers a benefit on landline LECs.

In addition, the LECs' takings arguments plainly misread Supreme Court precedent. The land use cases cited by those parties are inapposite because compensation for terminating telephone traffic (whether or not through bill and keep) has no effect on the real property of LECs. Further, the utility rate regulation line of cases does not support a taking because the compensation schemes proposed by PCIA are plainly not confiscatory.

Similarly, attempts to read narrowly the Commission's jurisdiction over LEC-CMRS interconnection misinterpret the scope of the agency's authority. Simply put, Section 332 provides the Commission with plenary jurisdiction over LEC-CMRS interconnection, as is evidenced by Congress's explicit intent to create a federal, nationwide regulatory approach to CMRS. Although the Commission has previously suggested that LEC-CMRS interconnection rates are not subject to federal jurisdiction under Section 332, this dictum was admittedly premised on an insufficient record and clearly must be disavowed.

The Commission's preemptive authority can also be based on the inseparability doctrine. Given the multistate aspects of CMRS networks and license areas and the mobile nature of subscribers, it is not possible to tease apart the intrastate portion of an interconnected call from the interstate portion. Even if it were possible rationally to divide the costs for such a call into federal and state portions, the rate aspect of CMRS

interconnection was effectively federalized by the passage of Section 332(c).

Therefore, interconnection rates must be governed by federal law.

Finally, the 1996 Act not only explicitly preserves the Commission's authority under Section 332, but further bolsters that authority in several respects. Section 251 of the 1996 Act clearly gives the FCC the lead role in promulgating interconnection rules, and limits the states to adopting rules that are not inconsistent with the federal requirements (without even requiring inseparability before preemption is justified). Further, this proceeding does not abrogate the Section 252 negotiations process, which applies primarily, if not exclusively, to negotiations between CLECs and LECs.

## **II. COMPENSATION FOR INTERCONNECTED TRAFFIC**

### **A. COMPENSATION ARRANGEMENTS**

#### **1. THE CURRENT SYSTEM IS NOT WORKING FOR EITHER BROADBAND OR NARROWBAND CMRS PROVIDERS**

In general, wireline LECs contend that existing "market based" interconnection agreements are satisfactory. For example, Ameritech stated that "the current system of market-based incentives is working precisely as expected,"<sup>4</sup> and Bell Atlantic suggested that "CMRS providers have enjoyed remarkable success under current arrangements."<sup>5</sup> Similarly, SBC maintained that "CMRS providers generally have significant and sufficient bargaining power to obtain appropriate interconnection agreements."<sup>6</sup>

These claims of a free and fair market for interconnected services cannot be credited. As the Commission has repeatedly pointed out, LECs are currently monopoly service providers.<sup>7</sup> If a CMRS provider is dissatisfied with the rates, terms and conditions offered by a LEC, it cannot shop around for a better deal, but rather must undertake expensive and time-consuming proceedings before the FCC or state commissions. Given the current lack of competition, most LECs have little incentive to offer interconnection on terms other than those that advantage themselves.

---

<sup>4</sup> Ameritech Comments at 4.

<sup>5</sup> Bell Atlantic Comments at 9.

<sup>6</sup> SBC Comments at 13.

<sup>7</sup> *See, e.g. Notice*, ¶ 12.

Further, the comments of both broadband and narrowband wireless carriers amply illustrate that the existing framework has ill-served CMRS providers. On the broadband side, AirTouch Communications indicated that LECs refuse to negotiate with cellular carriers on the basis of mutual compensation and have forced AirTouch to accept interconnection rates far above cost, often based on end-user (MTS) rates, rather than on a co-carrier model.<sup>8</sup> Similarly, AT&T Wireless Services stated that LECs have consistently charged "rates that bear no relationship" to the cost of interconnection, refused to compensate AT&T for terminating calls, and have not given AT&T the most desirable form of interconnection (Type 2B).<sup>9</sup> Comcast and many others remarked that LECs currently offer interconnection on a take it or leave it basis,<sup>10</sup> force wireless carriers to use expensive, poorly fitting wireline tariffs,<sup>11</sup> and charge wireless carriers 10 to 75 times the incremental cost of interconnection.<sup>12</sup>

Narrowband CMRS providers also noted the inadequacy of existing arrangements. As detailed by PageNet, some LECs have refused to respect the co-carrier status of paging providers by using their market power to charge "grossly excessive and patently anticompetitive" interconnection fees.<sup>13</sup> Further, AirTouch

---

<sup>8</sup> AirTouch Comments at 5.

<sup>9</sup> AT&T Wireless Services, Inc. Comments at 6-9.

<sup>10</sup> Comcast Comments at 4-5. *See also* American Mobile Telecommunications Ass'n Comments at 3; APC Comments at 2-6; Cox Comments at 11-12.

<sup>11</sup> Comcast Comments at 4-5.

<sup>12</sup> *Id.* at 5-6.

<sup>13</sup> Paging Network, Inc. Comments at 21.

noted that paging providers are not rewarded for "stimulating additional usage and revenue" to the LECs due to calls initiated by paged customers.<sup>14</sup> And, Arch Communications Group pointed out that all of its interconnection agreements fail to provide compensation for interconnection and call termination, and that LECs have actually *charged* Arch for terminating landline originating calls.<sup>15</sup>

The comments in this proceeding indicate that there is no "market" for interconnected services. If there were, the laws of supply and demand state that wireless carriers would be offered a sufficient variety of interconnection options at competitive prices. To the contrary, the record reflects the consequences of unilateral actions taken by monopoly service providers.

**2. LEC ARGUMENTS AGAINST BILL AND KEEP FOR BROADBAND CMRS ARE UNPERSUASIVE**

**a. BILL AND KEEP FAIRLY COMPENSATES LECS FOR THE USE OF THEIR NETWORKS**

Several LECs contended that bill and keep compensation allows broadband CMRS providers to use LEC networks free of charge. Specifically, these parties argued that bill and keep is inequitable for broadband CMRS because traffic flows are not balanced and termination costs are not zero.<sup>16</sup> Neither of these claims is firmly grounded in either fact or law.

---

<sup>14</sup> AirTouch Communications Comments at 59.

<sup>15</sup> Arch Communications Group Comments at 3.

<sup>16</sup> *See, e.g.* Ameritech Comments at 7-9.

Preliminarily, it is important to note that PCIA has only suggested bill and keep as an interim broadband solution until a cost-based plan can be developed or satisfactory inter-carrier agreements can be negotiated. Therefore, any inequities resulting from bill and keep would be short-lived. Moreover, as described in greater detail below, the comments in this proceeding demonstrate that bill and keep should not even cause short-term disparities in compensation.

For example, it is currently true that there are more cellular-LEC calls than LEC-cellular calls. However, this experience is largely an artifact of existing, one-sided compensation arrangements that create substantial disincentives to place calls to mobile subscribers. The Commission must recognize that zero-cost interconnection will itself stimulate an increase in LEC-to-mobile traffic. By removing significant costs, bill and keep will permit mobile carriers to offer expanded incentives -- such as APC's "first minute free" -- to inbound calling. Accordingly, past traffic patterns should not drive future interconnection policies.

In addition, call volumes are becoming more balanced with new PCS systems, as noted by APC.<sup>17</sup> As competition continues to develop between wireless and wireline carriers, and as cellular systems convert to digital technology, this trend will spread to other forms of broadband CMRS.<sup>18</sup> Until compensation arrangements

---

<sup>17</sup> APC Comments at 2 (its PCS network currently experiences 58% mobile-landline versus 42% landline-mobile calls).

<sup>18</sup> Cox Enterprises Comments at 20-22. Another factor promoting more balanced traffic is the introduction of automatic call delivery, which landline callers use to ensure that their calls are delivered. Century Cellunet Comments at 7.

reflect the co-carrier status of broadband CMRS providers and LECs, however, true equality of traffic flows cannot be anticipated.

Finally, bill and keep may be economically rational even in the interim when traffic flows are not strictly even. Bill and keep is equitable if the product of terminating call volume and terminating cost per call is roughly equal for both LECs and CMRS providers. Thus, even if fewer calls are terminated on the CMRS network, bill and keep is efficient if the cost of terminating those calls is greater. The record demonstrates the validity of this condition for two reasons: first, it is more expensive to locate a mobile customer and deliver a call to him or her than it is to locate and deliver a call to a landline customer; and second, mobile networks are much more traffic sensitive than landline networks, and therefore must undergo expensive upgrades to terminate an increased volume of landline originating traffic.<sup>19</sup>

**b. BILL AND KEEP IS NOT A FIFTH AMENDMENT  
TAKING OF LEC PROPERTY**

Several LECs argued that bill and keep represents a taking without compensation, in violation of their Fifth Amendment rights.<sup>20</sup> In this regard, some LECs assert that requiring them to terminate CMRS traffic constitutes a "physical

---

<sup>19</sup> AT&T Wireless Services Comments at 9-11.

<sup>20</sup> Bell Atlantic Comments at 8-9; US West Comments at 49-52. Notably, the LECs do not claim that paying terminating compensation to narrowband CMRS would be a taking, and any such claim would be plainly unavailing. Under current arrangements, it is narrowband CMRS providers who are being deprived of fair compensation for use of their networks.

intrusion" into LEC property,<sup>21</sup> and that even small physical intrusions into property for the purpose of carrying public utility traffic are takings.<sup>22</sup> These LECs also contend that bill and keep represents a taking because it is "so unjust as to be confiscatory."<sup>23</sup>

As pointed out by Sprint Spectrum and APC,<sup>24</sup> the LECs' takings arguments are at odds with Supreme Court precedent and the facts surrounding LEC-CMRS interconnection. The applicable takings cases can be divided into land use cases and utility rate regulation cases. As explained below, bill and keep does not come close to constituting a taking under either line of cases.

Regarding land use cases, as stated in *Lucas v. South Carolina Coastal Commission*,<sup>25</sup> there are "at least two discrete categories of regulatory action [which are] compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first category "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property," while the second

---

<sup>21</sup> US West Comments at 51 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987)).

<sup>22</sup> BellSouth Comments at 19 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419, 424-26 (1982)).

<sup>23</sup> BellSouth Comments at 20 (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308 (1989)).

<sup>24</sup> Sprint Spectrum and APC Joint Comments at 26-27.

<sup>25</sup> 505 U.S. 1003, 1015 (1992).

category "is where regulation denies all economically beneficial or productive use of the land."<sup>26</sup>

The "physical invasion" line of cases is typified by *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>27</sup> in which a New York statute permitted cable television operators to install cable television equipment on rental buildings without compensating the landlord.<sup>28</sup> The Court held that the cable installation "constitutes a taking under the traditional test [because the] installation involved the direct physical attachment of plates, boxes, wires, bolts, and screws to the building . . . ."<sup>29</sup> Similarly, in *Bell Atlantic Telephone Companies v. FCC*,<sup>30</sup> the D.C. Circuit held that the FCC's proposed physical co-location policy was a taking because it "vests the Commission with power to confer an exclusive right of physical occupation."

The "denial of productive use" line of cases is typified by *Nollan v. California Coastal Commission*,<sup>31</sup> in which California conditioned the issuance of a construction permit on the willingness of the property holder to grant the state an easement to permit access to an adjacent beach. The Court held that this regulation denied the

---

<sup>26</sup> *Id.*

<sup>27</sup> 485 U.S. 419 (1982).

<sup>28</sup> *Id.* at 423 (landlords were paid one dollar for the use of their property).

<sup>29</sup> *Id.* at 438.

<sup>30</sup> 24 F.3d 1441, 1446 (D.C. Cir. 1994).

<sup>31</sup> 483 U.S. 825 (1987).

property owner productive use of the land, because "the right to exclude others" is one of the "most essential" rights possessed by a property owner.<sup>32</sup>

A bill and keep compensation scheme for LEC-broadband CMRS interconnection plainly is not a "physical invasion" of LEC property. Unlike *Loretto* and *Bell Atlantic*, no CMRS equipment is being co-located on LEC property. Except for the trunks interconnecting the CMRS and LEC networks -- for which LECs are compensated under PCIA's shared cost approach -- LEC-CMRS interconnection leaves the LEC and CMRS networks entirely separate. Given this compartmentalization, a claim of "physical invasion" simply cannot be maintained. Further, reciprocal compensation hardly denies LECs all productive use of their property. Unlike *Nollan*, no party is being granted a right of use without compensation for the property owner. PCIA's proposals continue to grant the LECs full and unfettered access to their cables, switches and other facilities, and their expectation of compensation is rationally offset by the fact that they need not pay compensation to interconnecting CMRS providers (whose costs of termination, as noted above, are higher).

Under the rate regulation line of cases, when a federal or state agency promulgates a schedule of utility rates "all that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level."<sup>33</sup> A rate is too low only "if it is 'so unjust as to destroy the value of [the] property for all

---

<sup>32</sup> *Id.* at 831.

<sup>33</sup> *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392 (1974).

the purposes for which it was acquired.'"<sup>34</sup> Thus, governmental agencies are granted broad latitude to engage in reasonable rate making for regulated utilities.

Zero-cost termination clearly does not rise to the level of a taking under this line of cases. Most importantly, LECs are compensated for the zero-cost termination of broadband CMRS traffic through the zero-cost termination of LEC traffic by broadband CMRS providers. Thus, bill and keep represents a form of reciprocal compensation, which under no circumstances can be considered to be a taking. Second, any shortfall between the value of LEC termination of broadband CMRS traffic and broadband CMRS termination of LEC traffic can be recovered from LEC customers. Because LEC customers benefit from receiving mobile calls, there is no injustice in charging them for this benefit. Finally, even if the LECs do not recover all of their costs for terminating CMRS calls, this slight imbalance in compensation hardly rises to the constitutionally prohibited level of "destroy[ing] the value of [the] property for all the purposes for which it was acquired.'"<sup>35</sup>

### **3. THE RECORD SUPPORTS TERMINATING COMPENSATION FOR NARROWBAND CMRS PROVIDERS**

A number of parties joined with PCIA in suggesting a non-bill and keep form of terminating compensation for narrowband CMRS. These parties confirmed that bill and keep is a *per se* inappropriate means of reciprocal compensation for narrowband

---

<sup>34</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)).

<sup>35</sup> *Id.*

CMRS carriers because such carriers do not originate traffic.<sup>36</sup> Paging providers also noted that as co-carriers, they are entitled to interconnection agreements reflecting the fact that paging services stimulate a great deal of use of the LEC network.<sup>37</sup>

Narrowband carriers proposed a number of alternatives to the imposition of bill and keep compensation on an interim basis. Arch Communications Group and PageNet joined PCIA in proposing that LECs not impose any fees for the use of the link between the LEC switch and the paging provider's MTSO, and that LECs compensate paging providers at a tariffed rate for terminating traffic that originates on the LEC network.<sup>38</sup> More generally, AirTouch noted that "LECs should be paying narrowband CMRS providers to terminate traffic."<sup>39</sup>

Finally, a number of narrowband carriers seconded PCIA's contention that regulatory parity requires that the Commission afford terminating compensation to both broadband and narrowband CMRS carriers. As stated by Arch Communications Group, "The exclusion of [narrowband] carriers from any solution adopted by the Commission with respect to termination compensation would . . . be inconsistent with the Commission's goal of achieving regulatory parity for substantially similar services."<sup>40</sup> Similarly, PageNet observed that, because the Commission has found

---

<sup>36</sup> See, e.g., Paging Network Comments at 8.

<sup>37</sup> AirTouch Communications Comments at 5.

<sup>38</sup> Paging Network Comments at 26-29; Arch Communications Group Comments at 12-13.

<sup>39</sup> AirTouch Comments at 59.

<sup>40</sup> Arch Communications Group Comments at 23.

cellular, PCS, and paging "to be substitutes for one another," they must be subject to equivalent regulatory treatment.<sup>41</sup> Absent such regulatory parity, narrowband carriers will be placed at an unfair disadvantage when competing against broadband carriers, particularly given the trend toward integrated, one-stop provision of communication.<sup>42</sup>

## **B. IMPLEMENTATION OF COMPENSATION ARRANGEMENTS**

### **1. JURISDICTIONAL ISSUES**

As with the desirability and fairness of a bill and keep compensation scheme, the record in this proceeding was divided on the issue of FCC jurisdiction. Wireless providers<sup>43</sup> argued that the Commission can preempt state regulation of LEC-CMRS interconnection under Section 332 of the Communications Act of 1934, and the inseparability doctrine set forth in *Louisiana Public Service Commission v. FCC*.<sup>44</sup> They further contended that this preemptive authority is bolstered by the Telecommunications Act of 1996 ("1996 Act"). In opposition, the LECs, relying primarily on the 1996 Act, argued that the FCC is *without* jurisdiction to mandate terminating compensation arrangements for LEC-CMRS interconnection. As described in greater detail below, the LECs' jurisdictional analysis does not survive scrutiny.

---

<sup>41</sup> PageNet Comments at 11.

<sup>42</sup> *Id.* at 12.

<sup>43</sup> *See, e.g.* AirTouch Communications Comments at 43-55; Sprint Spectrum and APC Joint Comments at 37-50; Omnipoint Comments at 10-15.

<sup>44</sup> 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

**a. SECTION 332 EMPOWERS THE COMMISSION TO  
REGULATE LEC-CMRS INTERCONNECTION**

The LECs made a three-pronged argument that Section 332(c) does not preempt state regulation of LEC-CMRS interconnection. First, they contended that Section 332(c)(1)(B) confers federal authority over requests for LEC-CMRS interconnection, but not the rates charged for LEC-CMRS interconnection.<sup>45</sup> Second, they argued that the "rates" referred to in Section 332(c)(3) are subscriber rates, not inter-carrier rates.<sup>46</sup> Citing the Commission's decision in *Louisiana Public Service Commission*,<sup>47</sup> the LECs insisted Section 332(c)(3) preempts only "rates charged by," not "rates charged to" CMRS providers.<sup>48</sup> Finally, they maintained that even if the FCC has the authority to regulate CMRS rates under Section 332(c)(3), it does not have the jurisdiction to regulate the rates charged for LEC-terminated calls, because such call termination does not fall within the definition of "mobile services" under Section 332(d)(1).<sup>49</sup> These arguments are unavailing.

Preliminarily, the plain language and legislative history of Section 332 make it clear that Congress intended to confer a broad grant of federal jurisdiction over CMRS,

---

<sup>45</sup> USTA Comments at 16-19; Ameritech Comments at 11; BellSouth Comments at 34-35.

<sup>46</sup> NYNEX Comments at 41-43.

<sup>47</sup> *Petition On Behalf Of The Louisiana Public Service Comm'n For Authority To Retain Existing Jurisdiction Over CMRS Offered Within The State Of Louisiana*, 10 FCC Rcd 7898 (1995) ("*Louisiana Public Service Commission*").

<sup>48</sup> Bell Atlantic and Pacific Telesis *ex parte* Communication in CC Docket No. 95-185 (filed Mar. 13, 1996) at 8-9; US West Comments at 61-62.

<sup>49</sup> USTA Comments at 17-18; BellSouth Comments at 35-36.

and such a broad jurisdictional grant must encompass all aspects of CMRS interconnection. Section 332(c), which is entitled "regulatory treatment of mobile services,"<sup>50</sup> enumerates a comprehensive scheme describing the manner in which mobile services are to be regulated by both the federal government and the states -- a scheme that, in the parlance of preemption, "occupies the field." Confirmation of this sweeping Congressional intent comes from the House-Senate Conference Report, which stated that "the intent of this provision . . . is to establish a *Federal* regulatory framework governing the offering of all commercial mobile service."<sup>51</sup> To that end, Section 332(c) addresses virtually every aspect of regulation affecting CMRS providers.<sup>52</sup> Against this background, giving the FCC jurisdiction over *requests* for interconnection, and the states jurisdiction over the *rates* charged for such interconnection is inconsistent with the scope of the statute and clear Congressional intent.

---

<sup>50</sup> 47 U.S.C. § 332(c).

<sup>51</sup> H.R. Rep. No. 213 103rd Cong., 1st Sess. 490 (1993) ("Conference Report") (emphasis added).

<sup>52</sup> The pertinent subsections of Section 332(c) are as follows: (1) § 332(c)(1)(A) states that CMRS providers are common carriers for the purposes of FCC regulation, but gives the Commission the authority to forbear from enforcing certain aspects of Title II against CMRS providers; (2) § 332(c)(1)(B) states that CMRS providers, upon reasonable request, are entitled to interconnection pursuant to Section 201; (3) § 332(c)(1)(C) states that the Commission must periodically review the competitive market conditions for CMRS, and consider whether new regulations are necessary to enhance competition; (4) § 332(c)(2) addresses the non-common carrier treatment of private mobile services; (5) § 332(c)(3)(A) preempts all state entry and rate regulation of CMRS providers, reserving for states only the authority to regulate "other terms and conditions," and impose universal service obligations on certain CMRS providers; and (6) § 332(c)(3)(B) allows states to petition the Commission for permission to engage in CMRS rate regulation.

Second, neither the plain language nor the legislative history of Section 332(c)(3) dictates that "rates" refers to consumer, rather than inter-carrier rates. The Commission accordingly has wide discretion to determine that the preemption over rates extends to *all* rates charged by or to CMRS providers.<sup>53</sup> Such an interpretation is plainly warranted for several reasons.

Preliminarily, it is clear that, absent a Section 332(c)(3)(A) waiver, states are prohibited from regulating the rates CMRS providers charge their customers. CMRS carriers, like any rational business people, will pass any LEC-CMRS interconnection charges on to their customers in the form of higher rates. Thus, any attempt to separate the rates charged to carriers for interconnection from the rates charged to customers for interconnection is futile.<sup>54</sup> Any doubt that states are prohibited from regulating inter-carrier interconnection rates is further resolved by the fact that state jurisdiction is limited to the "other terms and conditions" of CMRS.<sup>55</sup> The legislative history of Section 332 makes it clear that such "terms and conditions" have nothing to do with inter-carrier interconnection rates. According to the House Report, "terms and conditions" is meant only to encompass "such matters as customer billing information . . . and other consumer protection matters."<sup>56</sup>

---

<sup>53</sup> See *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (if an agency is charged with administering a statute, and its suggested interpretation of an ambiguous provision of that statute is "reasonable," the agency's interpretation is to be accorded deference by a reviewing court).

<sup>54</sup> See Omnipoint Comments at 13-14.

<sup>55</sup> 47 U.S.C. § 332(c)(3)(a).

<sup>56</sup> H.R. Rep. No. 111 103rd Cong., 1st Sess. 260 (1993) ("House Report").

In support of their contention that states have exclusive jurisdiction over the rates for LEC-CMRS interconnection, the LECs cite *Louisiana Public Service Commission* for the proposition that "Section 332(c)(3) only covers the rates charged by CMRS providers to subscribers, not LEC-CMRS interconnection agreements."<sup>57</sup> This argument reads far too much into *Louisiana Public Service Commission*, which primarily stands for the proposition the CMRS market in Louisiana was sufficiently competitive to forbid state rate regulation.<sup>58</sup> It is only in the last portion of its opinion that the Commission briefly addressed the issue of state regulation of inter-carrier rates. Specifically, the Commission first noted that "[e]stablishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions *requires a more fully developed record than is presented here*."<sup>59</sup> Only after issuing this disclaimer did the Commission suggest that "Louisiana's regulation of the interconnection rate charged by landline telephone companies to CMRS providers *appears* to involve rate regulation only of the landline companies, not the CMRS providers, and thus does not *appear* to be circumscribed in any way by Section 332(c)(3)."<sup>60</sup>

---

<sup>57</sup> Bell Atlantic And Pacific Telesis *ex parte* at 8.

<sup>58</sup> See *Louisiana Public Service Commission*, 10 FCC Rcd 7898, ¶ 40 (the evidence presented was "not adequate to support a conclusion that market conditions fail to protect subscribers adequately from unjust and unreasonable rates . . .").

<sup>59</sup> *Id.*, ¶ 45 (emphasis added).

<sup>60</sup> *Id.*, ¶ 47 (emphasis added).

Thus, the portion of *Louisiana Public Service Commission* addressing federal jurisdiction over LEC-CMRS interconnection is dictum, reflecting a record that concededly was inadequately developed to permit a well-reasoned holding on this issue. In contrast, the instant proceeding contains a fully briefed record demonstrating that a broad reading of the rate preemption aspects of Section 332 is consistent with Congressional intent and sound policy considerations. Accordingly, the Commission should disavow this portion of *Louisiana Public Service Commission*.<sup>61</sup>

Finally, the argument that the termination of landline-to-mobile calls is not included within the definition of CMRS flies in the face of the definition of commercial mobile radio service contained in the *CMRS Second Report and Order*.<sup>62</sup> Specifically, commercial mobile radio service is defined as "radio communication service carried on between mobile stations or receivers, and land stations, and by mobile stations communicating among themselves,"<sup>63</sup> "provided for profit,"<sup>64</sup> interconnected to the "public switched network,"<sup>65</sup> and "made available to the public."<sup>66</sup> Under the plain terms of this definition, it is not tenable to argue that Congress intended to exclude

---

<sup>61</sup> See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (after supplying a "reasoned analysis" for doing so, an agency may "change its course").

<sup>62</sup> 9 FCC Rcd 1411 (1994).

<sup>63</sup> *Id.* at 1423 n.38.

<sup>64</sup> *Id.* at 1425.

<sup>65</sup> *Id.* at 1434.

<sup>66</sup> *Id.* at 1437.

landline-to-mobile calls but to include mobile-to-landline calls from the ambit of CMRS. Rather, CMRS is intended to encompass all calls made and received by mobile callers that are interconnected to the PSTN.

**b. THE INSEPARABILITY DOCTRINE FURTHER  
PERMITS THE FCC TO REGULATE LEC-CMRS  
INTERCONNECTION**

The LECs also argue that mandatory reciprocal interconnection arrangements violate the inseparability doctrine because interconnected calls can be categorized as either inter- or intrastate, and failing that, inter- and intrastate costs can be segregated.<sup>67</sup> This inseparability argument ignores a number of factual and legal aspects of LEC-CMRS interconnection.

As a matter of background, the inseparability doctrine arises out of the fact that under Section 152(b), as originally drafted, intrastate telecommunications were to be regulated by the states, while interstate communications were to be regulated by the FCC. In *Louisiana PSC*, the Court addressed the regulation of jurisdictionally mixed services, holding that "where it was not possible to separate the interstate and the intrastate components of the asserted FCC regulation," the federal regulation must preempt state law.<sup>68</sup>

---

<sup>67</sup> BellSouth Comments at 32-33; NYNEX Comments at 36-38.

<sup>68</sup> *Louisiana PSC*, 476 U.S. at 376 n.4 (citing *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977)).